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Supreme Court of the United States.

OCTOBER TERM, 1908.

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No. 337.

JACKSON W. GILES, *Plaintiff in Error,*
against
CHAS. B. TEASLEY ET AL., *Board of Registrars of Montgomery County, Alabama.*
} Suit for Damages.

No. 338.

JACKSON W. GILES, *Plaintiff in Error,*
against
CHAS. B. TEASLEY ET AL., *Board of Registrars of Montgomery County, Alabama.*
} Application for Mandamus.

BRIEF FOR PLAINTIFF IN ERROR.

WILFORD H. SMITH,
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(18,988 & 18,989.)

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Number 337 is an action for damages brought in the city court of Montgomery against the defendants in error for refusing to register the plaintiff in error and issue to him a certificate of qualification as an elector, for no other reason than his race and color, while all white men possessing the

same qualifications were registered and given certificates for life.

Record 337, pages 2 to 5.

Number 338 is an application for a writ of mandamus, also brought in the city court of Montgomery, to compel the defendants in error to register the plaintiff in error, and to issue to him a certificate of qualification as an elector, on the ground that he had been refused registration and a certificate, for no other reason than his race and color, while all white men possessing the same qualifications had been given life certificates.

Record 338, pages 1 to 9.

In both cases it was claimed that sections 181, 183, 184, 185, 186, 187, and 188 of "article VIII" of the Alabama constitution of 1901, under and by virtue of which the defendants in error were appointed and acting, were repugnant to the fourteenth and fifteenth amendments to the Constitution of the United States, in their purpose, in their language and meaning, and in the way and manner they were administered, and rights were asserted and claimed under the Federal Constitution. Demurrers to the complaint and application were sustained in both cases, and they were dismissed by the trial court. The plaintiff in error appealed to the supreme court of Alabama, and the judgment of the trial court was there affirmed. Whereupon writs of error were sued out to the supreme court of Alabama bringing the cases to this court. Plaintiff in error now points out the following errors in the decision of the supreme court of Alabama upon which he relies for reversal in this court, to wit:

ASSIGNMENT OF ERRORS.

First Assignment of Error.

Because the supreme court of Alabama erred in refusing to decide that the suffrage provisions of the constitution of Alabama were repugnant to the fourteenth and fifteenth amendments to the Constitution of the United States in the purpose for which they were framed and enacted, they being framed and enacted for the avowed purpose of disfranchising the negroes of Alabama without disfranchising a single white man.

Second Assignment of Error.

The supreme court of Alabama erred in refusing to decide that the suffrage provisions of the constitution of Alabama were repugnant to the fourteenth and fifteenth amendments to the Constitution of the United States in their language and meaning, they being so artfully framed that white men alone can become electors in the State of Alabama and negroes can be excluded and were excluded on account of their race and color and previous condition of servitude, except in such cases as happened to suit the arbitrary whims of the board of registrars.

Third Assignment of Error.

The supreme court of Alabama erred in refusing to decide that the suffrage provisions of the constitution of Alabama were made unconstitutional and void by the manner of their

administration by the defendants in error and all other boards in the State, in that they admitted all white men applying for registration to be registered as electors, and denied registration practically to all negroes, for no other reason than their race and color.

FOURTH ASSIGNMENT OF ERROR.

The supreme court of Alabama erred in refusing to reverse the judgment of the city court of Montgomery, wherein the prayer of the plaintiff in error for a writ of mandamus was denied, and his application and complaint for damages dismissed on demurrer.

ARGUMENT.

We submit that the record in these cases clearly shows that nothing but a Federal question was therein presented to the highest court of Alabama for decision, and that its decision was absolutely necessary to the determination of the causes, and that the judgment rendered by the supreme court of Alabama could not have been rendered without deciding the Federal question.

Johnson against Risk, 137 U. S., 300.

Wood Machine Co. against Skinner, 139 U. S., 293.

The Alabama supreme court undertook to avoid the Federal question in the following opinion in the suit for damages, to wit:

"TYSON, *J.*:

"If we accept (without deciding) as correct the insistence laid in appellant's brief that section 186 of article VIII of

the constitution of 1901 is void because repugnant to the 14th and 15th amendments of the Constitution of the United States, then the defendants were wholly without authority to register the plaintiff as a voter and their refusal to do so cannot be made the predicate for a recovery of damages against them.

"On the other hand if that section is the source of their authority, the jurisdiction is expressly conferred by it upon the defendants as a board of registrars to determine the qualifications of plaintiff as an elector and of his right to be registered as a voter. For their judicial act of refusing to register him predicated upon that determination, they are not liable in this action.

17 Am. & Eng. Ency. Law (2d ed.), pp. 727, 728, and notes.

"Affirmed."

Record 377, page 12.

The same thing was attempted in the following opinion in the application for mandamus, to wit:

"TYSON, *J.*:

"The petition in this case is for a writ of mandamus to compel the board of registrars for Montgomery county to register the petitioner as an elector. It alleges that sections 180, 181, 183, 184, 185, 186, 187 and 188 of art. VIII of the constitution of 1901, fixing the qualification of electors and prescribing the mode of registration, are unconstitutional because violative of the 14th and 15th amendments of the Constitution of the United States. The prayer is in substance that these sections of the constitution above enumerated be declared null and void and that an alternative writ of mandamus issue to the board of registrars commanding them to register as a qualified elector of the State of Alabama, upon the books provided therefor, the name of peti-

tioner and to issue to him a certificate of the fact in disregard of said sections of the constitution, etc., etc.

"As these sections of the constitution assailed created the board of registrars, fixed their tenure of office, defined and prescribed their duties, if they are stricken down on account of being unconstitutional, it is entirely clear that the board would have no existence and no duties to perform. So then taking the case as made by the petition, without deciding the constitutional question attempted to be raised or intimating anything as to the correctness of the contention on that question, there would be no board to perform the duty sought to be compelled by the writ and no duty imposed of which the petitioner can avail himself in this proceeding, to say nothing of his right to be registered.

"Affirmed."

Record 338, page 63.

The effect, however, of these decisions was to deny the rights claimed by the plaintiff in error under the Constitution of the United States, and to uphold the suffrage provisions of the constitution of Alabama, and the authority exercised under them, which were drawn in question as being repugnant to the Federal Constitution, and it is well settled that this court has jurisdiction in such cases to review the decision of a State court.

The language of Mr. Justice White, in Railway Company *vs.* Elliott, 184 U. S., 534, seems to be clearly in point. He said:

"The fact that a State court while deciding the Federal question erroneously held that it was not a Federal one does not take the case out of the rule, that when a Federal question has been decided below jurisdiction exists to review. The result of a contrary doctrine would be this; that no case where the question of Federal right had been actu

ally decided, could be reviewed here, if the State court in passing upon the question had also decided that it was non-Federal in its character."

Nor can the political nature of the rights involved be urged in these cases against the jurisdiction of this court; for it was held in McPherson *vs.* Blacker, 146 U. S., 23, that this court will not decline jurisdiction "upon the inadmissible suggestion that action might be taken by political agencies in disregard of the highest tribunal of the State as reviewed by our own." That was an application for mandamus to be directed to the secretary of state of the State of Michigan to compel action in a political matter.

The cases of Wiley *vs.* Sinkler, 179 U. S., 58, and Swafford *vs.* Templeton, 185 U. S., 487, are authority for the jurisdiction of the Federal courts to entertain a suit for damages where a political right under the Federal Constitution has been denied by virtue of an unconstitutional State statute, and much more obvious is the authority of this court to review the decision of a State court in such an action.

Kinneen *vs.* Wells, 144 Mass., 497.

The jurisdiction of this court, therefore, to review the decision of the supreme court of Alabama being beyond any question of doubt, we now call the court's attention to the reasons why the judgment of the Alabama supreme court should be reversed, and to that end submit the following

POINTS OF ARGUMENT.

I.

Because all the material facts alleged by the plaintiff in error in his complaint and application for mandamus were admitted by the demurrers of the defendants in error according to the elementary rules of pleading.

It was admitted that, although the whites and blacks were nearly equal in the population of Alabama, the convention which adopted the constitution, under and by virtue of which the defendants in error were appointed and acting, was composed exclusively of members of the white race, and was called for the avowed purpose of disfranchising the negroes without disfranchising a single white man. It was also admitted that the plaintiff in error was a citizen of the United States and of the State of Alabama, of African descent, known as a negro, and had theretofore been an elector under the laws of Alabama; that he applied for registration and was refused for no other reason than his race and color, and at the same time large numbers of his race were refused for the same reason, while all the white men who applied for registration, although possessing the same qualifications as the plaintiff in error, were registered and given certificates; that the plaintiff in error and all the members of his race applying for registration were compelled to furnish the testimony of white men, the testimony of all negroes being refused, while the white men applying for registration were registered upon their affidavit and application without any testimony.

II.

Because the purpose sought to be accomplished by the framers of the suffrage provisions of the constitution of Alabama was repugnant to the fourteenth and fifteenth amendments to the Constitution of the United States, such purpose being to disfranchise the negroes without disfranchising any white man.

Ah Kow *vs.* Nunan, 5th Sawyer, 553.
Cooley, Constitutional Limitations, 3d edition, p. 65.
Goedell *vs.* Palmer, 15 Appel. Div., N. Y., 86.

Had the constitutional convention been called for the purpose of establishing an educational or a property qualification, or a qualification of good moral character for all the electors of Alabama, black and white alike, and had carried out such a purpose, the plaintiff in error and the negroes of that Commonwealth would have made no complaint. But the convention made race and color the standard of qualification by resorting to a trick or legerdemain of law in constitution making.

In his opening address the Hon. John B. Knox, president of the convention, made the following statement of its purpose:

"In my judgment the people of Alabama have been called upon to face no more important situation than now confronts us, unless it be when they in 1861, stirred by the momentous issues of impending conflict between the North and South were forced to decide whether they would remain in or withdraw from the Union.

"Then as now, the negro was the prominent factor in the

issue. So long as the negro remains an insignificant minority and votes the Republican ticket, our friends in the North tolerate him with complacency, but there is not a State, and I might go further and say there is not an intelligent white man in the North, not gangrened by sectional prejudice and hatred of the South who would consent for a single day to submit to negro rule. If the negroes of the South should move in such numbers to the State of Massachusetts, or any other Northern State, as will enable them to elect the officers, levy the taxes, and control the government and policy of that State, I doubt not they would be met in the spirit as the negro laborers from the South were met in the State of Illinois, with bayonets led by a Republican governor, and firmly but emphatically informed, that no quarter would be shown them in that territory.

"And what is it that we do want to do? *Why, it is, within the limits imposed by the Federal Constitution to establish white supremacy in this State.*

"This is our problem and we should be permitted to deal with it unobstructed by outside influence, with a sense of our responsibility as citizens, and our duty to posterity. But if we would have white supremacy we must establish it by law—not by force or fraud.

"The justification for whatever manipulation of the ballot that has occurred in this State, has been the menace of negro domination. But a people cannot always live in a state of revolution. A time comes when, if they would be a free, happy and contented people, they must return to a constitutional form of government, where law and order prevail, and where every citizen stands ready to stake his life and his honor to maintain it. It has been urged in some quarters as a reason why this movement for a new constitution should be defeated, that we propose to adopt a suffrage plank which will offer to the negro an incentive to obtain an education, while the children of the white man will be without a like stimulant, because protected in his right to

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vote without regard to the density of his ignorance. I do not understand that any delegate to this convention is pledged to any such legislation. *We are pledged not to deprive any white man of the right to vote*, but this does not extend unless the convention chooses to extend it, beyond the life of voters now living."

Again, Judge Coleman, chairman of the committee on suffrage and elections, in his opening debate on the report of the committee submitting the suffrage provisions to the convention, advances the following argument:

"It should be remembered that the three conventions of Alabama which last assembled as a convention of the Democratic party, *declared that no white man should be disfranchised* except for crime." * * *

"Mr. President, and delegates of the convention, this Government was founded by white people. Its institutions have been preserved and enforced by the white race of this country, and it is within the past few years that the negro became a qualified voter, and citizen of the United States. In most of the States of this Union the proportion of such voters is so small that their influence is not felt in the general election. It is only in the Southern States that he has become an important factor, and under the present laws is a menace to our civilization, our happiness and prosperity. I would not violate any provision of the Constitution, but it is my opinion that we should go to the utmost limit allowed us to continue in control of this State and its political interests, that race of people which long has preserved its institutions and brought us through so much trouble, to our present prosperous condition." (Applause.)

III.

Because the suffrage provisions of the constitution of Alabama are in themselves repugnant to the fourteenth and fifteenth amendments to the Constitution of the United States by their language and meaning, they being so artfully constructed as to evade the prohibitions of the Federal Constitution, so that white men alone can become electors and negroes can be excluded on account of their race and color and previous condition.

Coxe *vs.* The State, 144 N. Y., 396.
Colon *vs.* Lisk, 153 N. Y., 188.
People *vs.* Albertson, 55 N. Y., 50.

Not only were they constructed in defiance and in fraud of the Federal Constitution, but with great ingenuity, so as to make it difficult to get the question of their constitutionality before the courts.

To give the court some idea of the contempt which the leaders of that convention had for the fifteenth amendment, I give the following from the closing speech of Judge Coleman, chairman of the committee on suffrage and elections, at the close of the debate on the committee's report:

"I was shocked to hear a man claiming pride in being a white man, to say that he regarded the 15th amendment as one of the brightest jewels in the crown, or one of the brightest something that is pinned to the Constitution. I don't remember exactly the language now. After hearing him say that, fellow-delegates, I was not surprised to hear him afterwards say that he feared neither man, hell nor the devil. If there was no other reason for calling this conven-

tion here, and no other reason for ratifying this constitution, it would be sufficient for me to work for it in order that so many of his constituents might be eliminated from the suffrage plank as to retire the gentlemen entertaining these sentiments. And I hope those living in that community will preserve the record of the man who could endorse the 15th amendment in Alabama, in view of all that we have gone through. I will not express my opinion of him." (Applause.)

"Mr. President, I believe as strongly as that I stand here, not only the fraud, the violence, the bloodshed, but I believe that not one of our fair women have ever been assaulted in this land but that the infamous act may be traced to the 15th amendment."

a. Because subdivisions 1 and 2 of section 180 of "article 8" are not such a statement of qualifications as are applicable to and attainable by all alike, regardless of race, color, or previous condition, but were framed purposely to discriminate against the negroes of Alabama, and to deny them the same rights as electors given to white men.

b. Because subdivision 3 of section 180 of "article 8" is made so general and indefinite as to invest the registrars with arbitrary power, so that they could discriminate against negroes and favor white men. The citizen is left to conjecture as to what kind of good character is meant, whether good moral character, or good character for peace or violence, or for honesty and fair dealing, or for truth and veracity. Likewise is a citizen at a loss to know what or which of the manifold duties and obligations of citizenship he is required to understand in order to meet the requirements of this subdivision.

c. Because section 186 of the suffrage article is repugnant to the Federal Constitution, in so far as the registrars were given the discretion and power of a court, with the right of appeal from their decision to the circuit court, thence to the supreme court, in view of the purpose the convention sought to accomplish by giving such discretion and power and in view of the admitted manner in which the registrars have used such discretion in the discharge of the duties of their office.

The supreme court of Alabama erroneously assumed that if this section was unconstitutional to the extent of investing the registrars with the power of contravening the prohibitions of the fourteenth and fifteenth amendments to the Federal Constitution, that then they would have no existence at all and no duties to perform. The right of the State of Alabama to appoint a board of registrars is not questioned in these cases, nor is its authority to prescribe their powers and duties, only to the extent of investing them with a discretion so as to accomplish the disfranchisement of the negroes on account of their race and color and previous condition, and the denial to them of the equal protection of the law, prohibited by the fourteenth and fifteenth amendments to the Federal Constitution.

IV.

Because the admitted facts showing the suffrage provisions of the constitution of Alabama in actual operation establish that practically all the white men in the State were admitted to the electorate and given life certificates, while practically all the negroes were denied registration on

account of their race and color and previous condition, which alone would render them unconstitutional, no matter what the intent was at the time of their enactment, and no matter in what form of language they were expressed.

In the great leading case of Yick Wo *vs.* Hopkins, 118 U. S., 356, upon which we have mainly relied, this court said:

"For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws, which is secured to the petitioner and all other persons by the broad and benign provisions of the 14th amendment to the Constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal mind, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The same general principle of constitutional law is tersely put by Chief Justice Lewis, of the supreme court of Nevada, in the case of Davies *vs.* McKeeby, 5th Nevada, 396. He said:

"The form of a law by which an individual is deprived of a constitutional right is immaterial. The test of its constitutionality is whether it operates to deprive any

person of a right guaranteed or given by the Constitution. If it does, it is a nullity whatever may be its form."

V.

Because section 181 of the suffrage article of the constitution of Alabama is a part of one entire scheme to evade the fifteenth amendment to the Constitution of the United States, and to subject the negroes of Alabama to a different test than that required of white citizens, and should also be declared null and void, since it is admitted that practically all the white men have been admitted to the electorate for life under section 180, or the temporary plan, and practically all the negroes have been refused.

To allow section 181 to stand would be to sanction the discrimination against negroes, and force them to submit to an educational and property qualification test not required of white men, in contravention of the fourteenth and fifteenth amendments to the Federal Constitution.

In the case of The U. S. *vs.* Reese, 92d U. S., 214, Chief Justice Waite said:

"The 15th amendment does not confer the right of suffrage upon any one. It prevents the States of the United States from giving preferences in this particular to one citizen of the United States over another, on account of race, color or previous condition of servitude."

Fair and equal treatment as a citizen is all that the plaintiff in error and the negroes of Alabama are contending for in this litigation, which treatment will be accorded wherever the fifteenth amendment is held in proper esteem.

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It unfortunately so happened that after the negro had been nearly forty years an elector in Alabama the less thoughtful of her white people were appealed to and misled by crafty and designing politicians to enact that constitution to disfranchise him, in defiance of the benign provisions of the fourteenth and fifteenth amendments to the Constitution of the United States and in contempt of the *golden rule;* so that we are now compelled by these suits to appeal to this court, which is the exponent of the conscience and honor of the American people, to say whether or not fair and equal treatment shall still remain the portion of all the citizens of the United States in Alabama under the Federal Constitution.

WILFORD H. SMITH,
Attorney for Plaintiff in Error.

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No. 407.

DAN ROGERS, PLAINTIFF IN ERROR, vs. THE STATE OF ALABAMA.	Murder Case.

MOTION TO CONSOLIDATE AND ADVANCE.

Objections by defendants in error, in above causes, numbered 337 and 338, to the motion made to consolidate and advance them for hearing with cause number 407, by W. A. Gunter, attorney for defendants in error in said causes 337 and 338.

The defendants in error in said causes 337 and 338 respectfully object to the granting of the motion to advance said causes and consolidate them with the criminal case numbered 407 for the following reasons:

1. The said causes 337 and 338, are wholly dissimilar to cause 407, the first being civil causes involving private rights between individuals, and the latter being a criminal cause between the State of Alabama and the defendant therein, who was indicted and convicted of murder.

The principle of consolidation is impossible of operation when the parties are different and the causes of action are different and the questions different. Here the causes are wholly distinct in every feature. The judgment in case number 407 was one of conviction at the instance of the State of the plaintiff in error of a murder; in number 337, the judgment sought was damages in favor of the plaintiff in error in that suit, for alleged wrongful official action of the defendants in error in that case; while in the third case, number 338, a mandamus is sought by the plaintiff in error to compel official action by the defendants in error in that case.

It is evident that these multifarious cases, distinct as to parties and the nature of the proceeding, do not fall within the rule of Revised Statutes sec. 921, nor of the rule of the English practice as to consolidation.

Mutual Life Ins. Co. v. Hillmon, 145 U. S., 285.

2. By reference to the decision of the State Court in cases number 337 and 338 shown in 33 So. Rep., 819-20, as well as in the Records on file, it will be seen that no federal question was actually decided. If the cases were disposed of below without passing on such a question, nothing short of a trial of these cases can determine whether or not such a question will be decided in this court, for it is clear that if the judgment of the lower court may rest, and was decided on a non-federal question, the judgment will not be disturbed.

New Orleans v. N. O. Water Works Co,, 142 U. S., 84.

It cannot, therefore, be said that all or any of these cases present *the* same question for consideration, although it may be possible that the same question might with others, be presented in each case.

3. The questions presented cannot be said to be of public interest requiring advancement of the causes on the trial docket. We know of no public interest that will be served by an early judgment in causes number 337-8, and if there is any, in a speedy trial of the criminal cause number 407, it does not apply to the civil cause number 337-8.

The defendants in error in the latter causes, therefore, respectfully object to any association of their cases with 407, as well as to any advancement on the docket.

M. H. Garrison

Attorney for Appellees,
In cases No. 337 and 338.